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**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA**

Susana Villanueva Garcia, et al.,

No. CV-20-00220-PHX-MTL

**Plaintiffs,**

## ORDER

V.

United States of America,

Defendant.

Before the Court is Defendant United States of America’s (“United States”) Motion to Dismiss for Lack of Subject Matter Jurisdiction (the “Motion”) (Doc. 20). This Motion was discussed at oral argument. The Court resolves the Motion as follows.

## I. BACKGROUND

This case involves tragic facts. In June 2017, the Highline Fire burned over 7,000 acres of land near Payson, Arizona. (Doc. 17 ¶¶ 20–21.) This fire incinerated vegetation and trees on national forest land in the Mongollon Rim area. (*Id.* ¶ 21.) More than 900 firefighters battled the Highline Fire. (*Id.* ¶ 22.) The Highline Fire specifically hit the Ellison Creek watershed, which is part of the Tonto National Forest. (*Id.* ¶¶ 24–25.) Many adjoining waterways that were impacted by the fire fed into Ellison Creek, which in turn would then flow downstream “into the public recreation areas along it.” (*Id.* ¶ 26.) “One such public recreation area is the Water Wheel area, a popular and easily-accessed hiking and swimming area with waterfalls, a swimming hole, large boulders, and sheer canyon walls.” (*Id.* ¶ 27.)

1       As the fire raged, the United States Forest Service (the “Forest Service”)  
 2 assembled an interdisciplinary Burned Area Emergency Response (“BAER”) team,  
 3 “whose purpose was to assess risks to life, property, and natural and cultural resources  
 4 and to recommend emergency response actions to reduce the anticipated consequences of  
 5 those risks.” (*Id.* ¶ 31.) The Forest Service issued an order closing the Highline Trail from  
 6 Dry Dude Creek to Ellison Creek on June 23, 2017. (Doc. 23-7 at 2.) The purpose of this  
 7 order was, in part, to protect the public’s health and safety from flash flooding. (*Id.*) A  
 8 Forest Service hydrologist released a Water Resources Specialist Report (the “Water  
 9 Report”) on July 2, 2017. (Doc. 20-5 at 15.) The Water Report sought to identify certain  
 10 post-wildfire threats and to suggest “treatments to prevent, mitigate or reduce the severity  
 11 of the threats.” (*Id.*) After considering many factors, such as watershed conditions and  
 12 pre- and post-fire peak flows, the Water Report observed that the “first few high intensity  
 13 storms following the fire pose the greatest flash flood hazard to downstream areas.” (*Id.*  
 14 at 18–19.) The Water Report concluded with an “Emergency Determination,” which  
 15 noted “[t]hreats to downstream life and property from post-fire watershed conditions”  
 16 and “[t]hreats to life and safety on the Highline and Myrtle trails that pass through and  
 17 below the burdened area from flash flooding.” (*Id.* at 21.)

18       After the fire was contained, on July 6, 2017, the BAER team completed its initial  
 19 and interim reports (collectively, the “BAER Report”). (*Id.* at 25–45.) The BAER Report  
 20 outlined many things, including critical threats, emergency treatment objectives, and  
 21 probabilities of treatment success. (*Id.*) This assessment noted two debris jams on Ellison  
 22 Creek toward the Highline Trail and three to four other debris jams in another creek. (*Id.*  
 23 at 5.) The BAER Report requested funding “for estimated emergency stabilization  
 24 funds.” (*Id.* at 25.) This included funding for two additional flash flood warning signs for  
 25 a road approximately seven miles from Cold Springs. (*Id.* at 3, 7–8.) This assessment did  
 26 not recommend closing national forest lands that included the Water Wheel site or Cold  
 27 Springs. (Doc. 15-2 ¶ 26.)

28       On July 15, 2017, the Garcia and Garnica families decided to celebrate a birthday

1 by swimming near the Water Wheel recreational site at the Cold Springs. (Doc. 17 ¶ 40.)  
 2 Several members of those families arrived at the Water Wheel parking lot in three  
 3 separate vehicles. (*Id.* ¶¶ 41–42.) The Forest Service charged \$9.00 per vehicle for  
 4 visitors to use the Water Wheel recreation area. (*Id.* ¶ 43.) Somebody in the group paid a  
 5 total of \$27.00 by depositing that amount “in a designated drop box.” (*Id.* ¶¶ 44–46.)

6 There were no specific flash flood warning signs at the Water Wheel site.<sup>1</sup> (*Id.*  
 7 ¶¶ 49, 51.) There were signs at a kiosk which contained warnings to swim “AT YOUR  
 8 OWN RISK” and to “[b]e aware of changing weather conditions.” (*Id.* ¶ 50; Doc. 20-6 at  
 9 7, 9.) All the family members hiked to, and swam at, the Cold Springs swimming hole.  
 10 (Doc. 17 ¶ 52.) Everyone was unaware of the heavy rains that began to fall eight miles  
 11 upstream. (*Id.*)

12 At 1:45 PM, the National Weather Service (“NWS”) dispatched a flash flood  
 13 warning for the region that includes the Cold Springs swimming hole. (*Id.* ¶ 53.) “Many  
 14 people, including the Garcia family, remained in the Water Wheel area, apparently  
 15 unaware” of the flash flood alert. (*Id.* ¶ 55.) Then, “[w]ithout warning, a black wall of  
 16 water, logs, rocks, mud, and debris descended on the Water Wheel area, moving far too  
 17 fast for those in its path to escape.” (*Id.* ¶ 56.) Although a few people “were able to grab  
 18 onto trees or rocks and make their way to safety,” a total of ten people “were swept away  
 19 by the wall of debris and died in the flood.” (*Id.* ¶¶ 57–59.) The Forest Service closed this  
 20 area after the flood. (*Id.* ¶ 61.)

21 Plaintiffs Susana Villanueva Garcia and her brother, Julio Cesar Garcia,  
 22 (collectively, the “Garcias” or “Plaintiffs”) brought this action against the United States.  
 23 (Doc. 17.) Ms. Villanueva Garcia also brings this action on behalf of all statutory  
 24 beneficiaries of Selia Garcia Castaneda, her mother, and J.L.V., her daughter. (*Id.*)

## 25 **II. LEGAL STANDARD**

26 This case involves tort claims against the federal government. Accordingly, the  
 27 Federal Tort Claims Act (“FTCA”) governs the issues presented. Motions to dismiss

28 <sup>1</sup> The Forest Service posted two “Flash Flood Area” signs on roads leading to the Water  
 Wheel recreational area, but no flash flood hazard signs at the site itself. (Doc. 20-6 at 3.)

1 based on an exception to the FTCA's waiver of sovereign immunity are treated as  
 2 motions to dismiss for lack of subject matter jurisdiction and reviewed under Rule  
 3 12(b)(1) of the Federal Rules of Civil Procedure. *McCarthy v. United States*, 850 F.2d  
 4 558, 560 (9th Cir. 1988) ("The question whether the United States has waived its  
 5 sovereign immunity against suits for damages is, in the first instance, a question of  
 6 subject matter jurisdiction."). While the plaintiff has the burden of showing that it has  
 7 alleged facts within the FTCA's waiver of immunity, the United States bears the burden  
 8 of proving the applicability of an exception to the waiver of immunity under the FTCA.  
 9 *Bailey v. United States*, 623 F.3d 855, 859 (9th Cir. 2010); *Prescott v. United States*, 973  
 10 F.2d 696, 701–02 (9th Cir. 1992).

### 11 III. DISCUSSION

12 The Garcias assert two causes of action under the FTCA: (1) negligence/gross  
 13 negligence and (2) wrongful death. (Doc. 17 ¶¶ 68–85.) The Garcias allege that the  
 14 United States is liable under four separate negligence theories: (1) "[f]ailing to warn  
 15 individuals in the Water Wheel area of the potential for flash floods, including by posting  
 16 appropriate signs at the Water Wheel parking lot and/or the adjacent trailhead;"  
 17 (2) "[f]ailing to warn individuals in the Water Wheel area of the NWS flood alert that  
 18 was issued on July 15, 2017;" (3) "[f]ailing to close the Water Wheel area to the public  
 19 after the NWS flood alert was issued on July 15, 2017;"<sup>2</sup> and (4) "[f]ailing to take  
 20 reasonable steps, such as removing floatable debris, to mitigate the danger posed by the  
 21 residual effects of the Highline Fire in Ellison Creek." (*Id.* ¶ 74.) The United States  
 22 argues that the FTCA's discretionary function exception bars the Garcias' first  
 23 negligence theory, failing to place appropriate flash floods signs. (Doc. 20 at 3–8.) The  
 24 United States also contends that all of the Garcias' negligence theories fail under the  
 25 FTCA's private party analogue requirement because their simple and gross negligence  
 26 claims are barred by Arizona's recreational use statute. (*Id.* at 8–17.)

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27 <sup>2</sup> As the United States noted at oral argument, the Garcias' First Amended Complaint  
 28 does not make clear whether the Garcias third theory of negligence includes the failure to  
 close the Water Wheel area to the public after the Highline Fire, as opposed to closing it  
 after the NWS flood alert.

1       The United States enjoys sovereign immunity; it cannot be sued without its  
 2 consent and such consent is a prerequisite for jurisdiction. *Conrad v. United States*, 447  
 3 F.3d 760, 764 (9th Cir. 2006). The FTCA “constitutes a limited waiver of that  
 4 immunity.” *LaBarge v. Mariposa Cnty.*, 798 F.2d 364, 366 (9th Cir. 1986). In one  
 5 instance, the FTCA waives sovereign immunity “under circumstances where the United  
 6 States, if a private person, would be liable to the claimant in accordance with the law of  
 7 the place where the act or omission occurred.” 28 U.S.C. § 1346(b)(1); *see also* 28 U.S.C.  
 8 § 2674 (“The United States shall be liable . . . relating to tort claims, in the same manner  
 9 and to the same extent as a private individual under like circumstances . . . ”). “The  
 10 FTCA’s broad waiver of sovereign immunity is subject to a number of exceptions,  
 11 including the discretionary function exception.” *Nanouk v. United States*, 974 F.3d 941,  
 12 944 (9th Cir. 2020). This statutory exception preserves the United States’ sovereign  
 13 immunity for any claim based on a discretionary function. *See* 28 U.S.C. § 2680(a). The  
 14 United States argues that both the existence of a discretionary function and a private party  
 15 analogue that shields it from liability and amounts to two jurisdictional hurdles that the  
 16 Garcias cannot overcome. The Court will address each argument in turn.

#### 17           **A. Discretionary Function Exception**

18       Courts follow a two-step test to determine whether the discretionary function  
 19 exception applies. First, courts ask whether the challenged act or omission was a  
 20 discretionary one—that is, whether it “involve[d] an element of judgment or choice.”  
 21 *Berkovitz v. United States*, 486 U.S. 531, 536 (1988). The discretionary function  
 22 exception does not apply when an applicable “statute, regulation, or policy specifically  
 23 prescribes a course of action.” *Id.* “If the act did not involve an element of judgment or  
 24 choice, the analysis ends there and the plaintiff’s claim may proceed.” *Nanouk*, 974 F.3d  
 25 at 945.

26       If the government’s conduct involved an element of judgment or choice, a court  
 27 must then ask whether the discretionary decision “is of the kind that the discretionary  
 28 function exception was designed to shield.” *Berkovitz*, 486 U.S. at 536. “The decision

1 must be one that is grounded in social, economic, and political policy.” *Young v. United*  
 2 *States*, 769 F.3d 1047, 1053 (9th Cir. 2014). The government prevails at step two if it can  
 3 show that the challenged decision is “susceptible to policy analysis.” *United States v.*  
 4 *Gaubert*, 499 U.S. 315, 325 (1991). The Ninth Circuit has acknowledged the “weaving  
 5 lines of precedent regarding what decisions” are discretionary in nature, particularly  
 6 when the allegation of agency wrongdoing involves a failure to warn. *Whisnant v. United*  
 7 *States*, 400 F.3d 1177, 1181 (9th Cir. 2005). Courts have noted that “[g]overnment  
 8 actions can be classified along a spectrum, ranging from those ‘totally divorced from the  
 9 sphere of policy analysis,’ such as driving a car, to those ‘fully grounded in regulatory  
 10 policy,’ such as the regulation and oversight of a bank.” *Id.* (quoting *O’Toole v. United*  
 11 *States*, 295 F.3d 1029, 1035 (9th Cir. 2002)).

### 12           **1. Discretionary or Mandated Act**

13           The United States first argues that “there was no specific and mandatory federal  
 14 statute, regulation or policy that mandated the placement of additional or more specific  
 15 flash flood warning signs or posters at the Water Wheel Parking Lot and/or adjacent  
 16 trailhead.” (Doc. 20 at 4.) The United States points to Forest Service manuals and Sign  
 17 and Poster Guidelines (the “Guidelines”) to show that the language therein “are not  
 18 regulations or mandates.” (*Id.* at 5.) The Garcias respond by arguing that the Guidelines’  
 19 applicable language gives the United States “no choice but to coordinate the development  
 20 of appropriate warning signs to mitigate the hazard.” (Doc. 23 at 6–7.) The Court finds  
 21 the United States’ argument more persuasive.

22           Discretion was conferred upon the Forest Service both explicitly and implicitly.  
 23 Discretion was conferred explicitly through use of the permissive term “should.” *See*  
 24 *Sabow v. United States*, 93 F.3d 1445, 1452 (9th Cir. 1996) (describing “should” as  
 25 “suggestive, not mandatory”) (citation omitted); *Marshall v. Anaconda Co.*, 596 F.2d  
 26 370, 375 (9th Cir. 1979) (noting that the “[s]hould . . . unless” language is clearly [m]ore  
 27 advisory”). Section 7.7 of the Guidelines concerns flash flood hazard site signage at  
 28 developed recreational sites. (Doc. 20-4 at 70.) This section provides:

1                   The Flash Flood Hazard site sign or poster . . . *should* be  
 2 posted at all developed recreation sites that the Forest Service  
 3 has determined are vulnerable to flash flooding. Hydrologists  
 4 and recreation managers *should* advise on the need for Flash  
 5 Flood Hazard site signs or posters. Flash flood hazard site  
 6 signs or posters *should* be posted on information boards  
 7 and/or at other prominent locations so that the signs are likely  
 8 to be seen by all visitors.

9                   (*Id.* (emphasis added).) “Should” is defined as: “guidance for a recommended but not  
 10 mandatory practice with deviations allowed where engineering judgment or engineering  
 11 study indicate a deviation is appropriate.”<sup>3</sup> (*Id.* at 30.)

12                  The Garcias contend the Guidelines mandate that the Forest Service post flash  
 13 flood hazard signs in vulnerable areas “unless an ‘engineering judgment or engineering  
 14 study’ has indicated that a deviation is appropriate.” (Doc. 23 at 6–7 (emphasis in  
 15 original).) This argument side-steps the fact that the Forest Service’s decision to place  
 16 flash flood signs is still discretionary. The Guidelines and its definitions make clear that  
 17 this is only guidance or a recommendation. The Garcias’ reading of the Guidelines is  
 18 misplaced because Forest Service officials evaluate several discretionary factors when  
 19 determining to put flash flood signs in certain locations. (Doc. 20-4 at 4–5.) Focusing on  
 20 the “engineering judgment or engineering study” language does not aid the Garcias’  
 21 argument because no facts suggest that such a judgment or study mandated that the Forest  
 22 Service place flash flood signs at the Water Wheel site. As the United States points out,  
 23 the Garcias’ argument also overlooks the definition’s final sentence, which states that  
 24 “should” is equal to “guidance.” (Doc. 24 at 3.) The Garcias point to another paragraph in  
 25 Section 7.7 of the Guidelines to argue that the Forest Service is mandated to coordinate  
 26 the development of signs to “mitigate specific hazards.”<sup>4</sup> (*Id.* at 7.) This argument fails

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27                  <sup>3</sup> This definition also states that in the Manual on Uniform Control Devices, which is the  
 28 “national standard for all traffic control devices,” “‘should’ is equal to ‘guidance.’” (*Id.* at  
 22, 30.) The Forest Service has adopted this manual. (*Id.* at 22.)

29                  <sup>4</sup> This paragraph reads: “Coordinate with the regional sign coordinator and appropriate  
 30 regional office recreation staff if new signs or posters need to be developed to mitigate  
 31 specific hazards. Regional supplements may be developed as necessary to respond to  
 32 specific situations or conditions or to insure consistency across a region.” (*Id.* at 68.)

1 for two reasons. First, this paragraph contains a passive term, “may.” *See Kingdomware*  
 2 *Technologies, Inc. v. United States*, 579 U.S. —, 136 S. Ct. 1969, 1977 (2016) (“[T]he  
 3 word ‘may’ . . . implies discretion . . .”). This paragraph also does not mention that  
 4 coordination to implement new signs or posters is mandatory in any way. Indeed, this  
 5 paragraph implies that coordination to develop new signs is a discretionary process that  
 6 only needs to be done when presented with specific situations or hazards. (*See* Doc. 20-4  
 7 at 68.)

8 Discretion was also conferred on the Forest Service’s decisions implicitly through  
 9 the embedding of discretionary choices throughout the policies. *See Gonzalez v. United*  
 10 *States*, 814 F.3d 1022, 1029 (9th Cir. 2016) (“Courts have consistently held that where,  
 11 as here, a government agent’s performance of an obligation requires that agent to make  
 12 judgment calls, the discretionary function exception applies.”). As the Forest Service’s  
 13 Director of Recreation, Heritage, and Wilderness Resources, Chris Hartman, indicates,  
 14 the Guidelines “has always been interpreted as necessitating a discretionary decision on  
 15 the need to post flash flood hazard site signs or posters.” (Doc. 20-4 at 4.) Mr. Hartman  
 16 further stated that he has never interpreted the Guidelines “as imposing a mandatory duty  
 17 on the Forest Service to post warning signs and posts at all parking lots or trailheads.”  
 18 (*Id.*) Indeed, these decisions depend on several discretionary factors. (*Id.* at 4–5.) The  
 19 challenged act therefore involves an element of judgment or choice.

## 20           **2. Susceptible to Policy Analysis**

21           The Court must now determine whether the Forest Service’s discretionary decision  
 22 is “one that is grounded in social, economic, and political policy.” *Young*, 769 F.3d at  
 23 1053. The United States argues that its decision regarding sign and poster placement and  
 24 wording are susceptible to policy analysis. (Doc. 20 at 5–6.) The United States provides  
 25 that Congress has mandated that the Forest Service is a “multiple use” organization to  
 26 show this decision is grounded in social and political policy. (*Id.* at 6 (citing 16 U.S.C.  
 27 § 531).) The United States also contends that its “decisions how to allocate funding and  
 28 human resources among competing priorities necessarily implicate economic policy.”

1       (Id.) Finally, the United States argues that “there can be no question here that the  
 2 challenged decision not to install additional signage involved balancing competing policy  
 3 priorities based on several discretionary factors,” such as harms with the proliferation of  
 4 signage and the sheer number of trailheads and developed recreational sites to manage.  
 5 (Id. at 6–8.) The Garcias respond by saying that a “decision not to warn of a specific,  
 6 known hazard . . . is not the kind of broader social, economic or political policy that the  
 7 discretionary function exception is intended to protect.” (Doc. 23 at 7–8 (quoting *Sutton*  
 8 v. *Earles*, 26 F.3d 903, 910 (9th Cir. 1994)).) The Garcias argue that the Forest Service  
 9 knew of potential flash flooding risks at Cold Springs and the failure to warn of that  
 10 specific hazard “did not involve any social, economic, or political consideration.” (Id. at  
 11 9–10.)

12       The Garcias cite *Kim v. United States*, 940 F.3d 484 (9th Cir. 2019), to support  
 13 their position. (Id. at 8.) In *Kim*, two children were killed after a tree limb fell on their  
 14 tent while camping at Yosemite National Park. 940 F.3d at 486. Park policies established  
 15 a “Hazard Tree Management” program, which included a seven-point system that  
 16 required documenting and quantifying hazardous trees with a rating system. *Id.* at 488. A  
 17 government worker, following this seven-point system, failed to remove the tree that  
 18 ended up killing the children. *Id.* at 488–89. The court noted that “[r]egardless of the  
 19 policy considerations that went into the choice to adopt the system, the *implementation* of  
 20 such system cannot be said to turn on those same considerations.” *Id.* (emphasis in  
 21 original). The court therefore found that the worker’s failure to remove the tree at issue  
 22 was not protected by the discretionary function exception. *Id.* at 490–91. Coming to this  
 23 decision, the panel reasoned that park workers inspecting trees were not making policy  
 24 choices given the application of specialized knowledge and professional judgment  
 25 making this decision. *Id.* at 489. The court concluded that “once Park officials undertook  
 26 to evaluate the danger of the trees in the campground, they were required to do so  
 27 according to the technical criteria set forth in the Park’s official policies.” *Id.*

28       The parties also addressed two more recent Ninth Circuit cases on this issue at oral

1 argument—*Lam v. United States*, 979 F.3d 665 (9th Cir. 2020) and *Nanouk v. United*  
 2 *States*, 974 F.3d 941 (9th Cir. 2020). (Doc. 26.) In *Lam*, the plaintiff was asleep in a  
 3 recreational area when a tree crashed into his tent and crushed his foot. 979 F.3d at 670.  
 4 During this time, the government employed a worker in this area who was trained “to  
 5 identify and remove hazardous trees” based on certain factors that would signal a threat.  
 6 *Id.* at 670–71. This worker inspected the tree at issue “before it fell, but he never saw any  
 7 reason to believe that it was dangerous.” *Id.* at 671. A divided Ninth Circuit panel found  
 8 the decision whether to remove the tree protected by the discretionary function exception.  
 9 *Id.* at 682. As to whether this decision implicated policy analysis, the court noted that  
 10 “social and political policy questions, maximizing aesthetics, and conserving natural  
 11 resources inevitably become competing interests.” *Id.* Thus, the “[c]ompeting interests  
 12 and policy concerns” required discretionary balancing and weighing, which immunizes  
 13 the government from suit in this situation.<sup>5</sup> *Id.*

14 In *Nanouk*, the plaintiff sued the United States when she alleged that her property  
 15 was “contaminated by hazardous chemicals negligently released from the site of a nearby  
 16 military facility.” 974 F.3d at 942. The plaintiff asserted three negligence theories against  
 17 the government: failing to remediate and dispose of the toxic chemicals while the  
 18 government operated the station at issue, shutting down the military facility and allowing  
 19 toxic barrels leak into the soil, and failing to clean up a 13-year-old hotspot. *Id.* at 945–  
 20 50. The court found the first two theories protected by the discretionary function  
 21 exception because the government’s decisions on the disposal of the toxic chemical and  
 22 the abandonment of the station were discretionary actions. *Id.* As to the second prong of  
 23 the discretionary function exception, the court concluded that the first two negligence

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24 <sup>5</sup> Judge Hurwitz dissented. *Id.* at 687–88. He noted that “*Kim* should control” the court’s  
 25 analysis because “[d]eciding whether a tree is diseased and poses a danger to campers,  
 26 like deciding when mold should be removed, ‘involves professional and scientific  
 27 judgment, not decisions of social, economic, or political policy.’” *Id.* at 689 (citation  
 28 omitted). Judge Hurwitz stated that “[h]aving voluntarily undertaken the task of  
 inspecting trees on its property to keep campers on its property safe, the government  
 should not escape liability for its alleged negligence by casting a camper’s injury as the  
 result of a policy decision.” *Id.* Even if Judge Hurwitz’s position was in the majority, it  
 would not apply here because the Forest Service provided no specific or technical  
 mandate that flash flood signage be placed at the Water Wheel site.

1 theories turned on issues of supervision, inspections, and competing policy  
 2 considerations, such as “the need to address simultaneous and more urgent safety  
 3 concerns presented by environmental contamination at sites assigned a higher priority  
 4 ranking,” which are intertwined in social, economic, and political policy. *Id.* The court,  
 5 however, found that the government had not “made any factual showing” whether its  
 6 failure to discover and remediate the contamination sooner was susceptible to policy  
 7 analysis and remanded on that issue. *Id.* at 949–50.

8       The Court is persuaded that the discretionary function exception applies here. The  
 9 government has provided sufficient evidence to prove its discretionary action to place  
 10 flash flood signs in certain areas of the national park is susceptible to policy analysis. The  
 11 Forest Service had to consider multiple policy-driven factors, such as how to allocate  
 12 funding and human resources among competing priorities. (Doc. 20-4 at 4–5.) This  
 13 economic factor balanced the expense of sign installations and maintenance with future  
 14 Forest Service objectives. (*Id.*) The government also had to weigh the risks associated  
 15 with the proliferation of hazard signs around the national forest. (*Id.*) The Forest  
 16 Service’s decision to place flash flood signs in certain locations also involved the  
 17 weighing of competing policy and safety considerations, which is protected by the  
 18 discretionary function exception. *See Nanouk*, 974 F.3d at 945–50. The BAER Report  
 19 expressly weighed competing policy considerations of which safety measures to take in  
 20 an expedited fashion, including where to place flash flood hazard signs. (Doc. 20-5 at 25–  
 21 45.) While the BAER Report recommended the Forest Service provide two additional  
 22 flash flood signs at roads miles away from the Water Wheel area, there was no directive  
 23 that the Forest Service place flash flood signs at the Water Wheel site itself. Forest  
 24 Service officials made policy decisions when deciding to prioritize certain safety risks  
 25 over others or where to allocate emergency funding. (*Id.*)

26       The Court agrees with the United States that *Kim* is distinguishable. (Doc. 24 at 4.)  
 27 Unlike the seven-point system in *Kim*, there are no facts suggesting that the Forest  
 28 Service was bound under a specific, technical system to evaluate where to place flash

1 flood signs. As the court in *Lam* recognized, when the government is balancing multiple  
 2 policy-driven factors without a specific system in place to instruct its decision-making  
 3 process, the government will be protected by the discretionary function exception. Here,  
 4 the Forest Service was doing just that, considering several policy-driven factors while  
 5 trying to balance safety decisions in the aftermath of a natural disaster.

6 The Court lacks subject matter jurisdiction over the Garcias' first negligence  
 7 theory because the discretionary function exception applies to the Forest Services'  
 8 decision regarding flash flood warning sign placement. The Court therefore grants the  
 9 Motion as to the Garcias' first theory of liability, that is, whether the Forest Service failed  
 10 to warn visitors with flash flood signage at the Water Wheel area.

11       **B. Private Party Analogue**

12 Evident from 28 U.S.C. §§ 2674 and 1346(b)(1), the FTCA encompasses only  
 13 those claims which possess a state-law private party analogue. *See Myohanen v. United*  
*14 States*, No. CV-19-05866-PHX-JJT, 2020 WL 6063294, at \*5 (D. Ariz. Oct. 14, 2020).  
 15 The Court must therefore "analogize the government to a private actor in a similar  
 16 situation and apply state law to determine amenability to suit and substantive liability."  
 17 *LaBarge v. Mariposa Cnty.*, 798 F.2d 364, 366 (9th Cir. 1986). The United States argues  
 18 here that it cannot be liable under any of the Garcias' negligence theories because of  
 19 Arizona's recreational use statute. *See Wilson v. United States*, 909 F.2d 953, 955–56 (8th  
 20 Cir. 1993) ("[T]he United States is entitled to the benefit of state recreational use statutes,  
 21 if applicable, when it is sued under the Federal Tort Claims Act."). Arizona's recreational  
 22 use statute provides in part that "[a] public or private owner, easement holder, lessee,  
 23 tenant, manager or occupant of premises is not liable to a recreational or educational  
 24 user." A.R.S. § 33-1551(A). The parties agree that the Garcia family members were  
 25 "recreational users" under the statute, insofar that they were hiking, swimming, and  
 26 engaging in other recreational pursuits. *Id.* § 33-1551(C)(5).

27       The parties contest whether two exceptions to the recreational use statute apply.  
 28 Those two exceptions allow liability when a landowner: (1) charges the person entering

1 the land an admission or entry fee, excluding nominal fees; or (2) “was guilty of willful,  
 2 malicious or grossly negligent conduct that was a direct cause of the injury to the  
 3 recreational or educational user.” *Id.* §§ 33-1551(A), (C)(5).

4 **1. Fee Charged Exception**

5 The United States acknowledges that the Garcias paid \$9.00 for each of their three  
 6 vehicles when they entered the Water Wheel area, but contend that this fee “was a use fee  
 7 for developed sites and not a general entry fee to the forest.” (Doc. 20 at 11.) Because this  
 8 was only a “use fee” and not an “admission fee” or “entry fee,” the United States  
 9 concludes that it is immune from all of the Garcias’ simple negligence theories on this  
 10 basis. (*Id.*) The Garcias respond that “[t]he fee was indisputably consideration which the  
 11 Garcia family was required to pay in exchange for permission to enter the premises with  
 12 their vehicles.” (Doc. 23 at 11.) To evaluate these arguments, the Court must first look to  
 13 the language of the statute at issue. *See Howard v. United States*, 181 F.3d 1064, 1070  
 14 (9th Cir. 1999) (“The interpretation of the various recreational use statutes is controlled  
 15 by the precise language of each statute.”) (citation omitted).

16 Under Arizona’s recreational use statute, a government entity will not have  
 17 immunity if a recreational user has provided “payment of an admission fee or any other  
 18 consideration to travel across or to enter premises.” A.R.S. § 33-1551(C)(5). Courts have  
 19 identified two categories of statutes that are often used in state recreational use statutes:  
 20 (1) “charge” or “fee” statutes and (2) “consideration” statutes. *See Howard*, 181 F.3d at  
 21 1068–70 (collecting cases). Under “charge” or “fee” statutes, “most courts have declined  
 22 to apply the exception to immunity unless an actual fee has been charged by the  
 23 landowner for entry onto the land.” *Id.* at 1068. “Under the consideration statutes, almost  
 24 any form of benefit to the landowner will act to trigger the immunity exception.” *Id.* at  
 25 1069. Arizona’s recreational use statute more closely mirrors a “consideration” statute.  
 26 The statute explicitly provides for “any other consideration.” A.R.S. § 33-1551(C)(5).  
 27 Indeed, other courts have found that recreational use statutes using the term  
 28 “consideration” is “far more encompassing” than more narrow terms, such as “fee” or

1 “charge.” *Ducey v. United States*, 713 F.2d 504, 510 (9th Cir. 1983). The statute’s  
 2 express language reflects the legislature’s intent that using the term “consideration”  
 3 applies broadly and encompasses activities like the Garcias’ payment.

4 The United States relies on two cases, *Jones v. United States*, 693 F.2d 1299 (9th  
 5 Cir. 1982) and *Howard*, 181 F.3d at 170, and a sign posted at the Water Wheel’s kiosk to  
 6 contend that its reading of the statute should govern.<sup>6</sup> (Doc. 20 at 10–11.) In *Jones*, the  
 7 court analyzed Washington’s recreational use statute, which was a “charge” or “fee”  
 8 statute, to determine whether the plaintiff, who was injured while snow tubing, could  
 9 recover from the government. 693 F.2d at 1303. The court determined that the  
 10 government was immune from suit under this statute because the fee paid to a third-party  
 11 concessionaire to rent the inner tube was not a charged fee to enter or use the  
 12 government’s land. *Id.* at 1303–04. Similarly, in *Howard*, the court analyzed a Hawaii  
 13 “charge” or “fee” recreational use statute. 181 F.3d at 1070. The court found the  
 14 government immune from suit because it “did not charge anyone for the use of its  
 15 facility” and the plaintiff, in fact, paid a private company for the activity that led to his  
 16 injury. *Id.* at 1070–71.

17 The United States’ reliance on these cases are misplaced. Both *Jones* and *Howard*  
 18 dealt with “charge” or “fee” statutes, rather than the consideration statute here. Both  
 19 cases also dealt with situations in which the plaintiff was not charged a fee to use the  
 20 government’s land at all. Here, however, the Garcias paid consideration to enter the  
 21 Water Wheel site and use the surrounding area.<sup>7</sup> The “use fee” highlighted in the kiosk’s  
 22 poster required visitors to pay before using the “recreation site” or face “criminal”

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23  
 24     <sup>6</sup> The sign posted at the Water Wheel’s kiosk provides that “[u]se fees are required at  
      many Forest Service recreation sites. Visitors must pay the posted use fee to an attendant  
      or by a ‘fee envelope’ . . . prior to using [the] recreation site. Failure to pay the use fee is  
      a criminal offense and subject to prosecution under State Law.” (Doc. 20-6 at 9.)

25  
 26     <sup>7</sup> The Forest Service’s sign posted at the Water Wheel’s kiosk makes evident that this  
      consideration applied to any visitor, whether that be someone arriving in a vehicle to use  
      the Water Wheel site or a person on foot looking to use the Water Wheel’s bathrooms or  
      picnic tables. (Doc. 20-6 at 9.) The United States agrees that this fee applied to any  
      visitor using the Water Wheel area and only certain individuals are exempted from  
      paying this fee, such as those with annual passes. (Doc. 24 at 4–5.) This fee applied to the  
      Garcias, who used the Water Wheel recreation area. (Doc. 17 ¶ 40.)

1 prosecution. This case does not involve a payment to a third-party concessionaire for an  
2 inner tube or a payment to a private party that was not related to the use of government  
3 land as in *Jones* and *Howard*. The government does not dispute that the Garcias paid a  
4 fee to use the Water Wheel recreation site. The cases that the United States relies on hold  
5 that a use fee is sufficient to invoke a recreational use statute's immunity waiver,  
6 especially when the fee is governed by a consideration statute. The Garcias payment was  
7 therefore a fee paid under the statute's plain meaning and the United States will not be  
8 immune under the recreational use statute unless this fee was nominal.

9       The Arizona recreational use statute provides that “[a] nominal fee that is charged  
10 by a public entity or a nonprofit corporation to offset the cost of providing the  
11 educational or recreational premises and associated services does not constitute an  
12 admission fee or any other consideration.” A.R.S. § 33-1551(C)(5). Arizona state courts  
13 have noted that “[t]he legislature has not defined ‘nominal’ for purposes of the  
14 recreational-use statute.” *MacKinney v. City of Tucson*, 231 Ariz. 584, 591 (App. 2013).  
15 These courts look to dictionaries to aid their interpretation, which define “nominal” as  
16 “insignificantly small” or “trifling, especially as compared to what would be expected.”  
17 *Id.* (citations omitted). Regardless of the exact definition, the parties agree that this is a  
18 very small amount in comparison to what something’s value is actually worth. (Doc. 20  
19 at 11; Doc. 23 at 12.)

20       The parties dispute whether the \$9.00 fee for each of the three vehicles was a  
21 nominal payment. In this case, the fee equates to \$1.80 per person. (Doc. 20 at 11.) The  
22 United States relies on *Allen v. Town of Prescott Valley*, 244 Ariz. 288 (App. 2018), to  
23 show that similar fees have been construed as nominal, especially given the costs offset  
24 other operating, maintaining, or improving fees. The United States also provides  
25 declarations noting that the fees collected here were applied toward operation and  
26 maintenance for several picnic sites. (*See, e.g.*, Doc. 20-2 ¶¶ 7–9, 16–17.) The Garcias  
27 point to *MacKinney*, which noted that whether a fee was nominal “is a mixed question of  
28 law and fact that may require additional findings.” 231 Ariz. at 591. The court in

1     *MacKinney* remanded the case for the trial court to determine “whether the fee was a  
 2 nominal fee,” as this question “can be answered only through a fact-specific inquiry.” *Id.*  
 3 The Garcias contend that *MacKinney* shows that it is premature to answer whether the  
 4 \$9.00 fee was nominal at this time. (Doc. 23 at 12–13.)

5         The Court agrees with the Garcias. Although the United States’ arguments on  
 6 whether this fee is nominal may ultimately prevail, it is too soon to conclude that the  
 7 \$9.00 fee is nominal. Though the United States has provided evidence that this fee was  
 8 offset by other costs, the Garcias are entitled to test this theory through discovery.  
 9 Tellingly, the only case that the United States cites on this issue was decided at the  
 10 summary judgment stage, after discovery had occurred. *See Allen*, 244 Ariz. at 289. The  
 11 United States cites no other cases to suggest that answering this fact-intensive question at  
 12 this stage is appropriate. The Court will therefore allow limited discovery. The Court will  
 13 deny the Motion without prejudice as to the three remaining simple negligence claims.  
 14 The United States may reassert this argument in a later motion to dismiss.

## 15              2.        Willful, Malicious, or Grossly Negligent Conduct Exception

16         Arizona’s recreational use statute also strips the government’s immunity if it “was  
 17 guilty of willful, malicious or grossly negligent conduct that was a direct cause of the  
 18 injury to the recreational or educational user.” A.R.S. § 33-1551(A). The statute defines  
 19 “grossly negligent” to mean “a knowing or reckless indifference to the health and safety  
 20 of others.” *Id.* § 33-1551(C)(2). As the United States notes, Arizona state courts find that  
 21 a defendant is grossly negligent only if “he knows or has reason to know facts which  
 22 would lead a reasonable person to realize that his conduct not only creates an  
 23 unreasonable risk of bodily harm to others but also involves a high probability that  
 24 substantial harm will result.” *Walls v. Ariz. Dep’t of Pub. Safety*, 170 Ariz. 591, 595  
 25 (App. 1991). Although the statute does not define “willful” or “malicious,” courts have  
 26 defined these terms as “intentional, wrongful conduct, done either with knowledge that  
 27 serious injury to another probably will result or with a wanton and reckless disregard of  
 28 the possible results.” *S. Pac. Transp. Co. v. Lueck*, 111 Ariz. 560, 563 (1975). Arizona

1 state courts have clarified that gross negligence and willful or malicious conduct are  
 2 “treated as one and the same” in many situations. *Williams v. Thude*, 188 Ariz. 257, 259  
 3 (1997).

4 The United States argues that the Garcias have failed to establish “jurisdictional  
 5 facts that the United States’ conduct was ‘willful, malicious or grossly negligent.’” (Doc.  
 6 20 at 12–17.) The United States points to remaining three gross negligence theories  
 7 (1) failure to relay the NWS to park visitors, (2) failure to close the Water Wheel or Cold  
 8 Spring areas, and (3) failure to remove debris jams and other floatable debris identified  
 9 by the Forest Service, to contend that no facts suggest that the government could be liable  
 10 under any theory. (*Id.*) The Garcias respond that the United States “seeks a dispositive  
 11 ruling on a highly fact-intensive inquiry, where no discovery has been done, and where  
 12 Plaintiffs have had no opportunity to request documents or depose witnesses.” (Doc. 23  
 13 at 13.) In any event, the Garcias contend that there are disputed materials facts with each  
 14 negligence theory that can be dealt only with on a more fully developed record. (*Id.* at  
 15 13–16.) The Garcias therefore ask this Court to “allow the parties to proceed to discovery  
 16 going to both the jurisdiction issues and the merits” because “there are significant facts in  
 17 dispute about the extent of the Forest Service’s knowledge, whether it reasonably should  
 18 have anticipated the danger to visitors, and whether it was negligent or grossly negligent  
 19 for failing to warn, close the area, or otherwise mitigate the risk to unsuspecting  
 20 swimmers.” (*Id.* at 17.)

21 The United States cites several cases to support its arguments that it cannot be  
 22 liable for gross negligence on any theory.<sup>8</sup> Notably, each of these cases proceeded to  
 23 summary judgment. The United States’ failure to cite a case with a similar procedural  
 24 posture to this instant case makes sense because “where the jurisdictional issue and the  
 25 substantive issue are so intertwined that the question of jurisdiction is dependent on

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26  
 27 <sup>8</sup> The United States cites: *Wringer v. United States*, 790 F. Supp. 210 (D. Ariz. 1992);  
 28 *Dickey ex rel. Dickey v. City of Flagstaff*, 205 Ariz. 1 (2003); *Armenta v. City of Casa  
 Grande*, 205 Ariz. 367 (App. 2003); *Grant v. Wakeda Campground, LLC*, 631 F. Supp.  
 2d 120 (D.N.H. 2009); and *In re Aramark Sports & Entm’t Servs., LLC*, 831 F.3d 1264  
 (10th Cir. 2016). (Doc. 20 at 12–17.)

1 factual issues going to the merits, the jurisdictional determination should await a  
 2 determination of the relevant facts on either a motion going to the merits or at trial.”  
 3 *Augustine v. United States*, 704 F.2d 1074, 1077 (9th Cir. 1983). When these issues are  
 4 intertwined, “the jurisdictional determination should await a determination of the relevant  
 5 facts.” *Id.* Courts therefore decline to dismiss cases at this stage of the litigation—where  
 6 there has been no discovery—to better understand the disputed jurisdictional and  
 7 substantive issues. *See, e.g., Young v. United States*, 769 F.3d 1047, 1052–53 (9th Cir.  
 8 2014) (holding that the plaintiffs’ “complaint should not have been dismissed” at the  
 9 12(b)(1) stage because “the Park Service’s knowledge of the hazard . . . should have  
 10 awaited a determination on the merits”).

11 Even though the Court must accept as true the factual allegations in the complaint  
 12 at this stage of the proceedings, *see Kim*, 940 F.3d at 490, the Garcias’ First Amended  
 13 Complaint does not provide an adequate basis for this Court to evaluate whether the  
 14 jurisdictional and substantive issues are so intertwined. The First Amended Complaint  
 15 asserts many allegations that the Forest Service and its employees had knowledge of, or  
 16 were reckless in failing to identify, many dangers that allegedly should have been fixed  
 17 or at least warned about. (*See, e.g.*, Doc. 17 ¶¶ 26, 29, 30, 62, 73, 75.) The First Amended  
 18 Complaint, however, does not properly set forth its gross negligence theory. The Garcias’  
 19 gross negligence theory is conflated with their simple negligence claim. (Doc. 17.) Given  
 20 that the Garcias’ gross negligence theory has not been parsed out, the First Amended  
 21 Complaint does not contain the required level of specificity to plead that separate cause  
 22 of action. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). The result of what the First  
 23 Amended Complaint provides are legal conclusions that the Forest Service was  
 24 recklessly, willfully, or grossly negligent in its conduct. This Court is not required “to  
 25 accept as true a legal conclusion couched as a factual allegation.” *Bell Atl. Corp. v.*  
*Twombly*, 550 U.S. 544, 555 (2007).

27 Federal Rule of Civil Procedure 15(a) provides that leave to amend should be  
 28 freely granted “when justice so requires.” Fed. R. Civ. P. 15(a)(2). “The power to grant

1 leave to amend . . . is entrusted to the discretion of the district court, which ‘determines  
2 the propriety of a motion to amend by ascertaining the presence of any of four factors:  
3 bad faith, undue delay, prejudice to the opposing party, and/or futility.’” *Serra v. Lappin*,  
4 600 F.3d 1191, 1200 (9th Cir. 2010) (quotation omitted). “Generally, this determination  
5 should be performed with all inferences in favor of granting the motion.” *Griggs v. Pace*  
6 *Am. Grp., Inc.*, 170 F.3d 877, 880 (9th Cir. 1999). As to the gross negligence theories, the  
7 Motion will be granted and the Garcias will have leave to amend.

8 **IV. CONCLUSION**

9 Accordingly,

10 **IT IS ORDERED** granting in part and denying in part the United States’  
11 Motion to Dismiss for Lack of Subject Matter Jurisdiction (Doc. 20) as follows:

12 1. The Garcias’ first negligence theory, failure to warn visitors with flash  
13 flood signage, is dismissed with prejudice for lack of subject matter jurisdiction.

14 2. The United States’ Motion to dismiss the simple negligence theories is  
15 denied without prejudice and may be refiled. Plaintiffs are permitted limited jurisdictional  
16 discovery on the nominal fee issue. The Court will allow the Garcias until May 3, 2021 to  
17 conduct this limited discovery. The Garcias may amend their complaint to include  
18 additional jurisdictional facts on this issue.

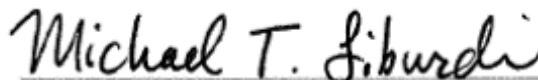
19 3. The United States’ Motion as to the Garcias’ gross negligence theories is  
20 granted for failure to state a claim, with leave to amend.

21 **IT IS FINALLY ORDERED** that the Garcias shall file their amended complaint,  
22 if they choose to do so, no later than May 13, 2021.

23 Dated this 18th day of March, 2021.

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26 Michael T. Liburdi  
27 United States District Judge  
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